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Supreme Court, U.S.
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No. 09-__-951

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IN THE

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Supreme Court of the United States

NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION, INC.,
Petitioner,

v.

UNITE (Union of Needletrades,
Industrial & Textile Employees) *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 *et seq.*, prohibit courts from authorizing the disclosure of evidence of violations of the Driver's Privacy Protection Act?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the United States Court of Appeals for the Third Circuit were the Appellant/Intervenor National Right to Work Legal Defense Foundation, Inc.; Appellee/Defendant UNITE (Union of Needletrades, Industrial & Textile Employees); and Appellees/Plaintiffs Elizabeth Pichler, Russell Christian, Seth Nye, Holly Marston, Kevin Quinn, Jose Sabastro, Thomas Riley, Amy Riley, and Russell Daubert, on behalf of themselves and those similarly situated.

The Foundation does not have a parent corporation and no publicly held company owns 10% or more of the Foundation's stock.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

The National Right to Work Legal Defense Foundation ("Foundation") respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 585 F.3d 741 (13 Nov. 2009). The orders of the United States District Court for the Eastern District of Pennsylvania dated 15 April 2008 and 7 February 2008 are not reported, but are reproduced in Appendices B and C.

JURISDICTION

On 13 November 2009, the Third Circuit affirmed a district court judgment that denied the Foundation's motion to modify a protective order. (App. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

At issue is the Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. § 2721 *et seq.*, which is reproduced in Appendix D. The pertinent provisions of the statute state:

> Section 2721. Prohibition on release and use of certain personal information from state motor vehicle records
>
> (a) In general—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:
>
> > (1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or
>
> * * *
>
> (b) Permissible uses—Personal information referred to in subsection (a) . . . may be disclosed as follows:
>
> * * *
>
> > (4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process,

investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

Section § 2722 Additional unlawful acts

(a) Procurement for unlawful purpose—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) False representation—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

STATEMENT OF THE CASE

This is an action by a legal aid foundation to obtain evidence of violations of the DPPA for the purpose of informing individuals that their rights under the DPPA were violated. At issue is whether the DPPA makes it unlawful for a federal court to authorize the use of evidence of DPPA violations for this purpose.

The DPPA protects the privacy of personal information contained in motor vehicle records. Among other things, the statute makes it "unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b)." 18 U.S.C. § 2722(a). Section 2721(b) lists fourteen (14) permissible uses of information from motor vehicle records. 18 U.S.C. § 2721(b).

In *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008), *cert. denied*, __ U.S. __, 129 S. Ct. 1662 (2009), the Third Circuit affirmed a judgment holding that the

union UNITE violated the DPPA by systematically obtaining personal information from motor vehicle records during the union's campaign against Cintas Corporation. Search records produced by Thompson West in *Pichler* indicate that UNITE conducted approximately 1,576 motor-vehicle record searches in conjunction with its Cintas campaign between August 2002 and October 2004.

The search records produced in *Pichler* also list over 12,000 additional motor-vehicle record searches by UNITE that are unrelated to its Cintas campaign.[1] The search records are written evidence of thousands of violations of the DPPA that will not be remedied in *Pichler*.

The Foundation is a non-profit, legal aid organization that provides information and legal assistance to employees who suffer violations of their rights as a result of compulsory unionism. The Foundation wishes to use the search records produced in *Pichler* to inform individuals that UNITE accessed their motor vehicle records, as these individuals likely are unaware of this unlawful invasion of their privacy. However, the search records are subject to a broad protective order issued in *Pichler*.

---

[1] Specifically, "[a]ccording to Westlaw's records, UNITE conducted about 13,700 motor vehicle searches on Westlaw from August of 2002 to October 13, 2004," and "[a]bout 1,576 of UNITE's searches on Westlaw related to Cintas." *Pichler v. UNITE*, 446 F. Supp. 2d 353, 361, *judgment modified*, 457 F. Supp. 2d 524 (E.D. Pa. 2006), *aff'd*, 542 F.3d 380 (3d Cir. 2008). Thus, the search records list over 12,000 motor vehicle record searches by UNITE that are unrelated to its campaign against Cintas (13,700 total searches – 1,576 Cintas searches = 12,124 non-Cintas searches). (*See also* App. 4a).

On 19 September 2007, the Foundation moved to intervene in *Pichler* to modify the protective order. The Foundation requested a court order that permits it to obtain the search records from the *Pichler* plaintiffs and use those records to send one (1) letter to each individual whose motor vehicle record UNITE accessed. The Foundation would then return the search records to the *Pichler* plaintiffs and destroy all information derived from them. This modification would ensure that only those individuals whose motor vehicle records UNITE accessed would learn of this fact, and no one else (including the Foundation itself). The requested court order would also satisfy the DPPA, which permits information from motor vehicle records to be used "pursuant to an order of a Federal . . . court." 18 U.S.C. § 2721(b)(4).

On 7 February 2008, the District Court for the Eastern District of Pennsylvania granted the Foundation's motion to intervene, but refused to modify its protective order on the grounds that the Foundation did not have a public right of access to the search records. (App. 36-37a). The Foundation moved for reconsideration, as its basis for standing was not the public access doctrine, but that the *Pichler* plaintiffs would provide the search records to the Foundation but for the court's protective order. On 15 April 2008, the district court denied this motion and held that it would not modify the protective order even if the Foundation had standing. (App. 28a).

On 13 November 2009, the Third Circuit affirmed the district court's judgment on yet another ground: that the Foundation lacked standing because the *Pichler* plaintiffs would violate the DPPA if they provided the search records to the Foundation. (App.

26a).[2] Thus, the court held that the DPPA prohibits the disclosure of evidence of violations of the DPPA, for the purpose of informing the victims of those violations, even when done pursuant to a court order.

REASONS FOR GRANTING THE WRIT

The Third Circuit has decided an important question of federal statutory law that has not been, but should be, decided by this Court. Specifically, the court held that the DPPA prohibits the disclosure of evidence of DPPA violations to notify the victims of those violations, even pursuant to court orders. Reversing this decision is of the utmost importance, as this irrational interpretation renders the DPPA self-defeating and nullifies the statutory authority of federal courts to authorize uses of information from motor vehicle records.

I. THE THIRD CIRCUIT HAS RENDERED THE DPPA SELF-DEFEATING BY INTERPRETING IT TO SHIELD EVIDENCE OF VIOLATIONS OF THE DPPA

Under the Third Circuit's decision, "whistle blowers" of DPPA violations are now subject to criminal and civil penalties under the DPPA if they obtain or disclose evidence of DPPA violations that include personal information from motor vehicle records (as will most evidence of DPPA violations). These sanctions include criminal fines, liquidated damages ($2,500 per violation), punitive damages, and attorneys' fees. 18 U.S.C. §§ 2723, 2724. These penalties

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[2] The Third Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. (*See* App. 11a, n.6).

will naturally dissuade anyone from disclosing evidence of unlawful motor vehicle record searches.

This, in turn, will prevent individuals from learning when their privacy rights under the DPPA are violated. For example, the Third Circuit's conclusion here that the DPPA makes it unlawful for the Foundation to use the search records to notify the victims of UNITE's motor vehicle record searches means that up to 12,000 individuals will never learn that UNITE wrongfully invaded their privacy rights.

The Third Circuit has construed the DPPA to frustrate its own enforcement, and turned the statute's purpose of protecting the privacy of motorists on its head to reach this result. The court counterintuitively reasoned that:

> The information the [Foundation] wants to obtain would do nothing more than identify potential litigants and claimants who may wish to pursue remedies for UNITE's violation of the DPPA. That is not enough to compromise the privacy afforded motorists by the DPPA.

(App. 24a). The court's notion that notifying motorists of violations of their privacy rights under the DPPA will "compromise the privacy afforded motorists by the DPPA" is untenable. No one has a privacy interest in *remaining ignorant* about invasions of their privacy and legal rights. Notifying individuals that their motor vehicle records were wrongfully accessed can only *advance* the privacy interests that the DPPA protects.

Interpreting the DPPA to shield evidence of DPPA violations also has the perverse result of permitting violators of the statute to conceal their transgressions with the DPPA itself. Here, the search records are

literally a written record of up to 12,000 DPPA violations by UNITE. Yet, the Third Circuit is permitting UNITE to use the DPPA to conceal this extensive log of its unlawful conduct from the very individuals subjected to the illegal searches.

The Third Circuit has interpreted the DPPA to be self-defeating by holding that the statute makes it illegal to disclose evidence of DPPA violations for the purpose of informing the victims of those violations. The petition for certiorari must be granted to ensure that the DPPA is not construed to frustrate its own enforcement. *Cf. Dalia v. United States*, 441 U.S. 238, 254 (1979) (refusing to interpret statute in a manner that thwarts its purpose because "[a] decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose.") (quotation omitted).

II. THE THIRD CIRCUIT ERRONEOUSLY NULLIFIED THE STATUTORY AUTHORITY OF FEDERAL COURTS TO AUTHORIZE USES OF INFORMATION FROM MOTOR VEHICLE RECORDS

The Third Circuit's self-defeating interpretation of the DPPA also nullifies the statutory power of federal courts to authorize the disclosure of information from motor vehicle records under the final clause to § 2721(b)(4) of the DPPA, which states:

> Personal information referred to in subsection (a) . . . may be disclosed as follows:
>
> * * *
>
> (b)(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the

> service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, *or pursuant to an order of a Federal, State, or local court*.

18 U.S.C. § 2721(b)(4) (emphasis added).

Here, the Foundation requested a court order permitting it to obtain the search records from the *Pichler* plaintiffs and to use those records to inform individuals that UNITE accessed their motor vehicle records. The district court plainly had the power to authorize this laudable course of action under the final clause to § 2721(b)(4).

But the Third Circuit brusquely stated, without any explanation, that it was "not persuaded" by the Foundation's reliance on the final clause to § 2721(b)(4). (App. 22a).[3] With this *ipse dixit* conclusion, the court not only interpreted the DPPA to be self-defeating, but also nullified the statutory power of federal courts to authorize the use of motor vehicle records under the final clause to § 2721(b)(4). This not only does great violence to the statute's text—as it effectively reads the final clause to § 2721(b)(4) out of the statute—but undermines an important exception to the DPPA's general prohibition applicable to the courts.

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[3] The court recognized that "[the Foundation] claims that the Disputed Search Records will be used 'pursuant to an order of a Federal . . . court' because it is requesting that a federal court enter an order that permits it to use the Disputed Search Records to send notices to the victims of UNITE's motor vehicle record searches." (App. 22a). Yet, the court never explains why the final clause to § 2721(b)(4) does not permit this use. Instead, the court only discusses the "investigation in anticipation of litigation" clause of § 2721(b)(4). (App. 24a-26a).

The Third Circuit has subverted both the text and purpose of the DPPA by holding that parties cannot use evidence of DPPA violations to notify the victims of those violations pursuant to orders of federal courts. The petition for certiorari should be granted to rectify this egregious error of statutory interpretation.

CONCLUSION

The Third Circuit has rendered the DPPA self-defeating by holding that the statute prohibits parties from obtaining or disclosing evidence of DPPA violations to notify the victims of those violations, even when done pursuant to a court order. The Court should take this case to restore the integrity of this federal statute.

Respectfully submitted,

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APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2354

ELIZABETH PICHLER; KATHLEEN KELLY; RUSSELL CHRISTIAN; DEBORAH BROWN; SETH NYE; HOLLY MARSTON; KEVIN QUINN; JOSE L. SABASTRO; DEBORAH A. SABASTRO; THOMAS RILEY; AMY RILEY; RUSSELL DAUBERT; CARRI DAUBERT,

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, AFL-CIO), A NEW YORK UNINCORPORATED ASSOCIATION; BRUCE RAYNOR, A NEW YORK RESIDENT; INTERNATIONAL BROTHERHOOD TEAMSTERS, DOES 1-10

NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION INC,

Intervenor in D.C. / Appellant

On Appeal From the United States District Court
for the Eastern District of Pennsylvania
(Civ. No. 2-04-cv-02841)
District Judge: Hon. Stewart Dalzell

Argued: February 2, 2009
(Opinion filed: November 13, 2009)

Before: McKEE and STAPLETON, *Circuit Judges*
and IRENAS,* Senior District Judge

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OPINION

McKee, *Circuit Judge*.

The National Right to Work Legal Defense Foundation ("NRTW") appeals the district court's order denying its motion to modify a protective order that restricts access to certain records. For the reasons that follow, we will affirm.

I. Factual Background.

In the fall of 2002, the Union of Needletrades, Industrial & Textile Employees AFL-CIO ("UNITE")[1]

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* The Honorable Joseph Irenas, Senior District Judge of the United States District Court for the District of New Jersey, sitting by designation.

decided to launch a union organizing campaign targeting CINTAS Corporation, the largest domestic employer in the industrial laundry industry.

CINTAS employs approximately 28,000 people at 350 locations in the United States and Canada. Many of those employees are female, Black, or Hispanic.

UNITE initiated that campaign because it believed that CINTAS was paying low wages, offering poor benefits, and subjecting its employees to unsafe working conditions, discriminatory practices, and violations of various labor laws.[2] "CINTAS . . . is philosophically opposed to unions and union organizing." *Pichler v. UNITE*, 542 F.3d 380, 383 (3d Cir. 2008). UNITE therefore believed that its organizing efforts would not be successful unless representatives of the union visited employees' homes because employees would not speak freely on the job where they could be observed by management and exposed to coercion and/or retaliation.

In order to contact CINTAS employees in their homes, UNITE compiled lists of names and addresses of presumed CINTAS workers from a variety of sources. The sources included license plate numbers of cars parked in CINTAS parking lots. The license plate numbers were used to obtain names and

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[1] In July of 2004, UNITE merged with the Hotel Employees and Restaurant Employees International Union ("HERE") and the combined entity became known as "UNITE HERE." We will refer to the union simply as "UNITE."

[2] The International Brotherhood of Teamsters AFL-CIO represented some of UNITE's employees, and UNITE and the Teamsters therefore agreed to work together to organize CINTAS employees. The Teamsters are not involved in this appeal.

addresses of the registered owners of the respective cars from databases containing state motor vehicle records, a technique known as "tagging."

Tagging was generally accomplished by UNITE organizers entering or observing a CINTAS parking lot and recording license plate numbers of cars. The license plate numbers were then checked by using either a Westlaw database or private investigators known as "information brokers." The information brokers would—either directly or through intermediaries—obtain the owners' names and addresses through state motor vehicle bureaus. This allowed UNITE to obtain names and addresses of employees who might support unionizing CINTAS, and it also allowed UNITE to identify potential plaintiffs and construct a plaintiff class consisting of approximately 1,800 to 2,000 CINTAS employees. The class action subsequently asserted claims against CINTAS for violating various employment laws.

According to Westlaw's records, UNITE conducted approximately 13,700 motor vehicle searches on Westlaw from August of 2002 to October 13, 2004. However, some of those searches were duplicates and some did not result in the retrieval of any information. Of the total Westlaw searches conducted by UNITE, approximately 1,576 pertained to CINTAS. The remainder of the searches—approximately 12,000 in number—did not pertain to individuals related to UNITE's labor organizing campaign at CINTAS. This appeal centers around Westlaw's recreation of those 12,000 searches.

The named plaintiffs in this case, Elizabeth Pichler, Kathleen F. Kelly, Deborah Brown, Russell Christian, Carri Daubert, Holly Marston, Seth Nye, Kevin Quinn, Amy Riley, Thomas Riley, Deborah A.

Sabastro, Jose L. Sabastro and Russell Daubert all have some connection to CINTAS's plant in Emmaus, Pennsylvania[3] Employees Pichler, Quinn, Thomas Riley and Jose Sabastro began complaining about UNITE's actions and inquiring into how UNITE could have obtained their home addresses.

Employee complaints eventually came to the attention of CINTAS's outside counsel, Jeffrey I. Kohn, of O'Melveny & Myers. Kohn, in turn, contacted Paul R. Rosen, of Spector Gadon & Rosen, P.C., to inquire whether he had any interest in representing employees who were upset about what had happened. In April 2004, employees Pichler, Brown, Kelly, Nye, Russell Daubert, Thomas Riley and Jose Sabastro, met with Kohn and James Bucci of Spector Gadon. Kohn introduced himself and asked the employees to describe their encounters with the union organizers. Soon after the meeting, Bucci contacted nonemployees Christian Marston, Carri Daubert, Amy Riley and Deborah Sabastro by telephone. Ultimately, Spector Gadon was retained to bring a lawsuit against UNITE based on UNITE's tagging operation.

On June 28, 2004, Spector Gadon filed a lawsuit on behalf of the named plaintiffs. A few weeks later, a one-count amended class action complaint was filed, alleging that UNITE and Bruce Raynor, UNITE's president (hereinafter collectively "UNITE"), violated the Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. §§ 2721-25. UNITE moved to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(6); however, the district court denied the motion.

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[3] The group includes CINTAS employees, as well as spouses and friends of employees, whose cars were driven to work by employees.

Pichler v. UNITE, 339 F. Supp. 2d 665 (E.D. Pa. 2004) ("*Pichler I*"). On May 31, 2005, the district court certified a class to proceed against UNITE, though not against Raynor, and dismissed some of the plaintiffs for lack of standing. *Pichler v. UNITE*, 228 F.R.D. 230 (E.D. Pa. 2005) ("*Pichler II*"). On August 30, 2006, the district court found that UNITE had violated the DPPA, granted summary judgment against UNITE, awarded the plaintiffs $2,500 each, and granted summary judgment in favor of Raynor. *Pichler v. UNITE*, 446 F. Supp. 2d 353 (E.D. Pa. 2006) ("*Pichler III*"). Pursuant to Fed. R. Civ. P. 54(b), the district court also certified the case for appellate review, deferring the questions about class-wide and injunctive relief.

Finally, on October 17, 2006, the district court amended its previous judgment and granted summary judgment to UNITE on the issue of punitive damages. *Pichler v. UNITE*, 457 F. Supp. 2d 524 (E.D. Pa. 2006) ("*Pichler IV*"). The district court also permanently enjoined UNITE and its employees from using or disclosing any of the plaintiffs' personal information obtained by UNITE in violation of the DPPA. Both sides appealed.

We affirmed the district court in part, vacated and remanded in part. Although several issues were raised during that appeal, the only issue relevant to our inquiry here is the challenge to UNITE's tagging operation, and the plaintiffs' claim that it violated the DPPA. We affirmed the district court's conclusion that UNITE had violated the DPPA by accessing plaintiffs' motor vehicle records during its tagging operation. *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008) ("*Pichler V*").

A. The Protective Order.

Shortly after the district court denied UNITE's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), UNITE filed a motion for a protective order[4] which it claimed was necessary to safeguard the privacy of the individuals involved in the *Pichler* class action, prevent disclosure of UNITE's organizing strategy, and also prevent CINTAS from using the *Pichler* class action as a tactical weapon against UNITE. The district court issued the requested protective order on January 7, 2005. That order allows UNITE to designate "potential evidence as confidential if that potential evidence directly relates to defendants' labor union organizing or mobilization strategies." (J. App. 29.) According to UNITE, the protective order has allowed the *Pichler* class action to proceed independently of both UNITE's organizing efforts and the ongoing litigation involving UNITE and CINTAS.

The protective order in the *Pichler* class action pertains to the records that were disclosed in response to the *Pichler* plaintiffs' subpoena *duces tecum* as well as the testimony of a representative of the company which operates Westlaw. Those records included Westlaw's recreation of the searches UNITE conducted between July 1, 2002 and October 13, 2004. UNITE designated those records as confidential pursuant to the protective order, and therefore never filed them with the court. Accordingly, they never became part of the judicial record.

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[4] A "'Protective Order' properly denotes court orders over information exchanged during discovery." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 n.1 (3d Cir. 1994) (citing Fed. R. Civ. P. 26(c)).

Most importantly for our purposes, the disclosed records that are subject to the protective order include the names of the approximately 12,000 people whose motor vehicle information was accessed by UNITE, but who were not connected to UNITE's union organizing campaign at CINTAS, and who were not putative members of the *Pichler* class action against UNITE (the "Disputed Search Records").

As we mentioned at the outset, this appeal arises from the district court's refusal to modify that protective order to allow the NRTW access to the Disputed Search Records. The NRTW is a foundation that describes itself as "a non-profit, legal aid organization that provides information and legal assistance to employees who have suffered violations of their rights as a result of compulsory unionism." (Appellant's Br. 7.) The NRTW summarizes its interest in the *Pichler* class action as follows: "[T]he [NRTW] seeks to inform individuals whose motor vehicle records were searched by UNITE, and who are outside the Plaintiff Class, that UNITE accessed their motor vehicle records in potential violation of the DPPA." (Appellant's Br. 8.)

B. The NRTW's Attempt to Intervene.

On July 30, 2007, the NRTW sent a letter to counsel for the *Pichler* plaintiffs requesting access to the Disputed Search Records for the purpose of contacting the approximately 12,000 individuals whose motor vehicle records were accessed by UNITE, who are not connected to UNITE's union organizing campaign at CINTAS, and who are not putative members of the *Pichler* class. *Pichler* class counsel responded by informing the NRTW that they had no objection to such disclosure if it was consistent with the limitations imposed by the district court's protective order

and the DPPA. Class counsel agreed not to object to the NRTW's intervention in the *Pichler* litigation, but stated that they would take no position on the merits of the NRTW's efforts to obtain the records.

Thereafter, on September 19, 2007, while the interlocutory appeal of the district court's grant of summary judgment in *Pichler III* was pending, the NRTW moved to intervene in the *Pichler* class action. The NRTW asked the court to modify the protective order to allow it to access the Disputed Search Records in order to notify each of the approximately 12,000 individuals whose names and addresses are contained in the Disputed Search Records that their privacy rights under the DPPA may have been violated by UNITE.

If allowed access to the records, the NRTW intends to inform those individuals that UNITE may have violated their rights under the DPPA. The NRTW represented to the district court that it would use the Disputed Search Records to mail one letter to each of the 12,000 individuals to inform them that UNITE accessed their motor vehicle records.

The proposed letter states:

> The [NRTW] is a non-profit legal-aid organization that provides information and free legal advice and representation to employees who have suffered violations of their rights as a result of compulsory unionism.
>
> *******
>
> If your [sic] are interested in determining whether UNITE's search of your motor vehicle records violated your rights under the Driver's Privacy Protection Act, you should contact an

> attorney. If you wish, you can contact the [NRTW] to learn about your rights and options under the Driver's Privacy Protection Act.

(J. App. 118-19.)

UNITE sought to prevent the NRTW from accessing the Disputed Search Records. UNITE contended that "NRTW is philosophically opposed to UNITE's organizing activities, and the information NRTW seeks can be used to reverse engineer organizing strategies and combat UNITE's organizing mission." (J. App. 9.)

On February 7, 2008, the district court granted the NRTW's motion to intervene, but denied the NRTW's motion to modify the protective order. The district court explained that "NRTW's only basis for accessing this information is the common law right of access to judicial records; they do not, and we believe cannot, point to any other common law, statutory, or Constitutional right that would create a path of access to the documents they desire. . . ." (J. App. 10-11.) The court explained further that "what NRTW seeks has not been filed with the court in any motions or pleadings; instead, it consists of defendants' production to the plaintiffs; such documents are raw discovery and are ordinarily inaccessible to the public through the common law right of access; thus, NRTW has no path of access to this information or a presumptive right to it."[5] (J. App. 12.)

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[5] The right of access to judicial proceedings and judicial records is beyond dispute. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) (citations omitted). However, because the documents the NRTW seeks have never been filed with the district court, they are not judicial records, and, therefore, the NRTW cannot obtain access to them under the right of access

On February 19, 2008, the NRTW moved for reconsideration, arguing that it never claimed it had a public right of access to the documents. Rather, the NRTW had relied on the fact that *Pichler* class counsel would provide the documents to it but for the protective order prohibiting disclosure.

On April 15, 2008, the district court denied the NRTW's motion for reconsideration. The district court clarified that in its February 7, 2008 order, it had "held that NRTW did not have standing to seek the documents in question because it had no path of access to the documents, i.e., there is no legal basis for NRTW to get at these documents other than the fact that plaintiffs have them." (J. App. 3.) In the alternative, the district court held that, even if the NRTW did have standing, modification of the protective order would not be appropriate under the applicable legal standard.

This appeal followed.[6]

II. The Driver's Privacy Protection Act of 1994.

The DPPA forbids state officials from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity: personal information . . . about any individual obtained by the department [of motor

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doctrine. *Id.* at 780-83. The NRTW does not dispute that it cannot obtain the documents under the right of access doctrine.

[6] We have jurisdiction under the collateral order doctrine to review the denial of the motion to modify the Protective Order and the denial of the motion to reconsider. *See Shingara v. Skiles*, 420 F.3d 301, 304-05 (3d Cir. 2005). Our review is for abuse of discretion, but we exercise plenary review over the district court's interpretation and application of the legal standard for granting or modifying a confidentiality order. *Id.* at 305 (citation omitted).

vehicles] in connection with a motor vehicle record," unless certain specified exceptions to the prohibition apply. 18 U.S.C. § 2721(a). The DPPA also prohibits others from knowingly "obtain[ing] or disclos[ing] personal information, from a motor vehicle record" for an unlawful purpose and from "mak[ing] false representation[s] to obtain any personal information from an individual's motor vehicle record." 18 U.S.C. § 2722. Those who "knowingly obtain[], disclose[] or use[] personal information, from a motor vehicle record" are "liable to the individual to whom the information pertains. . . ." 18 U.S.C. § 2724(a). If a defendant is found liable, a court may award:

> (1) actual damages, but not less than liquidated damages in the amount of $2,500;
>
> (2) punitive damages upon proof of willful or reckless disregard of the law;
>
> (3) reasonable attorneys' fees and other litigation costs reasonably incurred; and
>
> (4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2724(b).

However, the DPPA also specifies a total of 14 exceptions to the general prohibition against disclosing motor vehicle records. *See* 18 U.S.C. § 2721(b). In *Pichler III*, the district court rejected UNITE's claim that its tagging operation fit within two of the 14 exceptions in the DPPA, and that it should therefore not be held liable for violating the DPPA's prohibitions. Those two exceptions allow access in connection with litigation (the "litigation exception") or for use by a governmental agency or any private person or entity acting on an agency's

behalf (the "agency exception"). Specifically, the litigation exception states that motor vehicle records may be accessed:

> For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4). The agency exception allows records to be accessed "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. § 2721(b)(1).

As we have just noted, in defending against the *Pichler* class action, UNITE argued that tagging was a permissible use under the litigation and agency exceptions. UNITE contended that the litigation exception applied because it had obtained the plaintiffs' personal information as part of a union organizing effort, activity protected under the National Labor Relations Act. *See* 29 U.S.C. § 157. UNITE also argued that the agency exception applied because it had subsequently filed discrimination charges against CINTAS with the EEOC and was therefore acting as a private attorney general to eradicate employment discrimination at CINTAS. It further contended that the agency exception applied because it either assisted, or itself filed, four OHSA com-

plaints against CINTAS.[7] The district court rejected UNITE's contentions and concluded that UNITE's tagging operation violated the DPPA. *See Pichler III*, 446 F. Supp. 2d at 373-74.

III. Discussion.

Although the litigation involving UNITE, CINTAS, and the *Pichler* class is multifaceted and ongoing, the dispute before us is discrete and straightforward. As we noted at the outset, the NRTW argues that the district court erred in not modifying the protective order to allow it access to the Disputed Search Records.

The district court held that the NRTW lacked standing to request modification of the protective order because the Disputed Search Records are not judicial records, and the NRTW therefore lacked a path of access. The NRTW contends on appeal that it has standing to seek modification of the protective order, not based on the common law right of access to judicial records, but rather because *Pichler* class counsel would provide the Disputed Search Records to NRTW if not for the protective order. In response, UNITE argues that the NRTW lacks standing under

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[7] "From 2002 through October 13, 2004, UNITE brought or assisted in bringing against CINTAS, six federal cases, three state court cases, eighteen charges with the Equal Employment Opportunity Commission ("EEOC"), and four charges with the Occupational Safety and Health Administration ("OSHA"). *Pichler III*, 446 F. Supp. 2d at 363 (footnotes omitted). "UNITE also filed unfair labor practice charges with various offices of the National Labor Relations Board ("NLRB"), some of which were settled without any admission of liability." *Id.* "In addition . . ., UNITE . . . filed a charge with the Ohio Civil Rights Commission, and the California Department of Fair Employment and Housing." *Id.*

this second theory as well. Because we agree that the NRTW lacks standing, that ends our inquiry, we need not consider the district court's alternative holding that modification of the protective order is inappropriate on the merits.[8]

In *Pansy v. Borough of Stroudsburg*, we addressed a third party's standing to challenge protective orders or confidentiality orders[9] in an effort to access information or judicial proceedings. 23 F.3d 772 (3d Cir. 1994). We began our standing analysis by explaining:

> Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.

Id. at 777 (quoting *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citation and internal quotations omitted)).

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[8] Standing is a jurisdictional requirement under Article III. *See Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175 (3d Cir. 2000). In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998), the Supreme Court held that a federal court may generally not rule on the merits of a case without first determining jurisdictional issues.

[9] A confidentiality order "denote[s] any court order which in any way restricts access to or disclosure of any form of information or proceeding, including but not limited to 'protective orders,' 'sealing orders' and 'secrecy orders.'" *Pansy*, 23 F.3d at 777 n. 1.

In *FOCUS v. Allegheny County Court of Common Pleas*, we considered whether a citizen's advocacy group ("FOCUS") had standing "to present . . . free speech challenges to the gag orders"[10] that had been entered by a state trial court. 75 F.3d 834, 838 (3d Cir. 1996). We noted that:

> The party invoking federal jurisdiction bears the burden of establishing the elements of standing, and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Id. (citations and internal quotations omitted).

Questions of standing arose in *FOCUS* because gag orders had constrained the attorneys and parties in other litigation from disclosing information to FOCUS that was pertinent to the group's mission. FOCUS argued that the gag orders entered in the other litigation prevented a willing speaker from disclosing information to it, even though the orders did not "constrain [FOCUS's] speech in any way[,]" and that FOCUS therefore had standing. *Id.* We agreed that the impact of the orders on FOCUS could be sufficient to give FOCUS standing to challenge the protective orders. We explained that "'[w] e have routinely found, . . . that third parties have standing to challenge protective orders and confidentiality orders in an effort to obtain access to information or judicial proceedings.'"

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[10] No party involved in the appeal addressed the issue of FOCUS's standing.

Id. (quoting Pansy, 23 F.3d at 777). However, we also noted:

> [That] putative recipients of speech usually have standing to challenge orders silencing would-be speakers does not necessarily mean that [FOCUS has] standing . . . . [FOCUS] must still show that the gag orders have caused them injury in fact and that their injury is likely to be redressed by a favorable decision. . . . Accordingly, courts have found that third parties have standing to challenge a gag order only when there is reason to believe that the individual subject to the gag order is willing to speak and is being restrained from doing so.

Id. at 838-39 (citations omitted). Consistent with the last sentence recited above, we wrote:

> Looking at the allegations in the verified complaint in the light most favorable to [FOCUS] here, there are reasons to conclude that [FOCUS] has adequately met a "willingness of the speaker" requirement for standing at this stage of the litigation. As we have noted, while neither party to the [other litigation] is on record as being opposed to the gag orders, the [foster parents involved in the other litigation] at least were willing to talk at some point prior to the entry of the gag orders: The complaint alleges that the [foster parents] "recently released a book detailing their experiences with [a child they were trying to adopt] and their frustration with [Allegheny County Children and Youth Services] and the courts." Moreover, the complaint further alleges that the judge "has threatened to remove [the child] from the [foster parents'] home if [the foster parents] appear to

> publicly promote their book or otherwise discuss their case." It is reasonable to infer from these allegations that the [foster parents] are willing but restrained speakers who dare not challenge the gag orders for fear of reprisal from the judge. At this stage, we must accept these allegations and this permissible inference in [FOCUS's] favor.
>
> In sum, we find that [FOCUS] has alleged facts in [its] verified complaint which would be sufficient to survive a motion to dismiss for lack of standing.

Id. at 839.

We also discussed the "willing speaker" doctrine in *United States v. Wecht*, 484 F.3d 194 (3d Cir. 2007). The case involved Dr. Cyril Wecht, a well-known forensic pathologist, who had been indicted for theft of honest services, mail fraud, wire fraud, and theft from an organization receiving federal funds. After the indictment, the government and defense counsel agreed to a gag order pursuant to a local rule of the United States District Court for the Western District of Pennsylvania which limited the extent to which attorneys could comment on a case. About two months after the gag order was entered, the government notified the district court about statements that Wecht's attorneys had made to the press.

At some point, two newspapers and two TV stations successfully moved to intervene and then challenged the gag order under the willing speaker doctrine. They argued that since defense counsel wanted to speak about the case, the gag order placed an improper restriction on their access to the attorneys' statements. The media outlets claimed this

improper restriction gave rise to their third-party standing to challenge the constitutionality of the local rule allowing such gag orders, and, therefore, they could bring claims for disclosure under the First Amendment on behalf of the public. *Wecht*, 484 F.3d at 202.

The government contended that the defense attorneys could not be willing speakers because they agreed to the gag order. The government argued that defense counsel's consent to the gag orders precluded the media outlets from establishing third-party standing.

We began our discussion of third party standing by recalling our analysis in *FOCUS*:

> We noted [in FOCUS] that "putative recipients of speech usually have standing to challenge orders silencing would-be speakers," but that "plaintiffs still must show that the gag orders have caused them injury in fact and that their injury is likely to be redressed by a favorable decision." [*Focus*, 75 F.3d] at 838. Accordingly, we held that "third parties have standing to challenge a gag order only when there is reason to believe that the individual subject to the gag order is willing to speak and is being restrained from doing so." [*Focus*, 75 F.3d] at 838-39.

Wecht, 484 F.3d at 202. We rejected the government'sargument that defense counsel's consent to the gag order negated third party standing because that argument "misconstrue[d] the purpose of the 'willing speaker' rule as well as the requirements for standing." *Id.* We explained:

> The purpose of the "willing speaker" requirement, therefore, is not to tie the third party's

> interests to those of the speaker, but to ensure that there is an injury in fact that would be redressed by a favorable decision. Here, it is undisputed that Wecht's attorneys are willing to speak about the case and that [the local rule pursuant to which the gag order was entered] limits their ability to do so. To the extent that an occasion arises in the future where defense counsel desires to make public statements about the case, we believe the media and the public have a legitimate interest in those comments not being inhibited by overly restrictive limitations. Accordingly, we hold that the consent of the parties to the order limiting speech is irrelevant to third-party standing analysis as long as the third party can demonstrate that an individual subject to the order would speak more freely if the order is lifted or modified. . . . The media outlets have satisfied this requirement and have standing to challenge the constitutionality of the [local rule].

Id. at 202-03.

Based on these cases, the NRTW contends that it has third party standing to seek modification of the protective order and obtain access to the Disputed Search Records because *Pichler* class counsel would provide the Disputed Search Records absent the protective order. However, the NRTW misinterprets the parameters of the willing speaker doctrine as well as the obstacles to disclosure of the Disputed Search Records.

Pichler class counsel cannot accurately be characterized as willing to provide the Disputed Search Records but for the protective order. In response to the NRTW's July 30, 2007 letter requesting disclosure, *Pichler* class counsel wrote:

> We and our clients have no objection to providing you with this information, at your expense, *provided* that we are assured that doing so will not violate any obligations we may have to maintain the confidentiality of that information, whether pursuant to the Court's protective order or under the DPPA. In this regard we would accept your proposal that you intervene in this case to seek an order permitting our disclosure of this information to you. We would consent to your motion to intervene, but not take a position as to the merits of your effort to obtain the information.

(J. App. 115 (emphasis in original).)

Thus, *Pichler* class counsel are not in the same position as the foster parents in *FOCUS* or defense counsel in *Wecht*, all of whom were willing to speak, but silenced solely by gag orders.[11] The protective order is not the only reason the NRTW is prevented from accessing the Disputed Search Records here, and NRTW's claim to the contrary is just plain wrong. Even absent the protective order, disclosure still cannot be allowed if it would violate the prohibitions and protections Congress established under the DPPA.

The NRTW argues that it can obtain the Disputed Search Records under the DPPA's "litigation excep-

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[11] In addition, the challenges in *FOCUS* and *Wecht* were premised on violations of First Amendment rights. FOCUS alleged that the gag order violated its First Amendment rights, and the media outlets in *Wecht* asserted First Amendment claims on behalf of the public. Obviously, the NRTW cannot make a First Amendment challenge to the protective order here.

tion." As previously noted, that exception allows disclosure of otherwise protected records:

> For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4). The NRTW makes three arguments in support of its contention. First, it claims that the Disputed Search Records will be used "pursuant to an order of a Federal . . . court" because it is requesting that a federal court enter an order that permits it to use the Disputed Search Records to send notices to the victims of UNITE's motor vehicle record searches. Second, NRTW contends that its use of the Disputed Search Records will be "in connection with any civil . . . proceeding in any Federal . . . court" because using evidence of the wrongdoing in *Pichler* to inform similarly situated victims is an action "in connection with" the *Pichler* class action against UNITE. Third, it contends that its use of the Disputed Search Records will be pursuant to an "investigation in anticipation of litigation" because it intends to provide free legal aid to employees who contact it upon learning that UNITE violated their DPPA rights. We are not persuaded by any of these arguments.

When we decided *Pichler V*, we agreed with the district court's conclusion that the litigation exception did not extend to UNITE's tagging operation. In rejecting UNITE's contrary position there, the district court explained:

> [T]he exception applies only if a defendant obtains protected information for a permitted "use." As we construe the term, *"use" implies a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding.*

Pichler I, 339 F. Supp. 2d at 668 (emphasis added). We agreed with the district court that the litigation exception of the DPPA requires something more than merely using the protected records to identify potential litigants. The two examples that the district court used in explaining the limitation of the exceptions UNITE relied upon illustrate the point:

> [I]f the Unions claimed before the [National Labor Relations] Board that Cintas somehow rigged a certification election so that the results did not accurately reflect the number of employees who wanted union representation, they would need to identify which employees actually desired such representation. Obtaining personal information about employees to contact them regarding how they voted would be a permissible "use" because it is reasonably likely that the Board would need to know which employees supported unionization. On the other hand, the litigation exception would not apply if the Unions argued before the NLRB that Cintas engaged in an unfair labor practice by hiring security guards to keep them from recording employee license plate numbers because it is not reasonably likely that the Board would require any information about which employees parked in a particular lot to resolve the issue.

Id.

Just as the litigation exception protected the records of CINTAS employees who might have been interested in pursuing legal or administrative remedies against their employer from UNITE's tagging operation, it also protects the 12,000 persons whose records comprise the Disputed Search Records from the NRTW's efforts to identify persons who might be interested in pursuing legal remedies against UNITE.

The records the NRTW is seeking will not advance the inquiry of any decisionmaker charged with deciding any claims under the DPPA that may arise from disclosure to the NRTW. The information the NRTW wants to obtain would do nothing more than identify potential litigants and claimants who may wish to pursue remedies for UNITE's violation of the DPPA. That is not enough to compromise the privacy afforded motorists by the DPPA. In fact,

> The least sympathetic case for discovery sharing is presented by a request for access on behalf of someone who is merely contemplating the commencement of litigation. The risk of a fishing expedition or some other form of mischief is greatest in this context. The safest course seems to be denial of discovery sharing until the requesting party actually has begun a lawsuit, unless he demonstrates extraordinary need.

Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 499 (1991).

UNITE's use of the information obtained through tagging was impermissible because it amounted to nothing more than discovery of potential plaintiffs. We see no distinction between UNITE's impermissi-

ble purpose, and the purpose for which the NRTW is seeking the information.

We realize that the district court's analysis in Pichler I turned in part upon the "tenuous connection between the protected information and issues tangentially related to a conceivable litigation strategy," *Pichler I*, 339 F. Supp. 2d at 668, and that it is far more likely that litigation could result from disclosure here because there is little doubt that each of the persons whose records were accessed has a cause of action under the DPPA. However, that is not determinative. Rather, as the district court explained, the applicable exceptions to the protections of the DPPA turn on whether there is a "reasonable likelihood" that the disputed records would assist the fact finder's resolution of the dispute before it.

As the district court explained in *Pichler III*, "[t]he DPPA . . . does not permit one to acquire and use statutorily proscribed personal information to solicit or find claims." 446 F. Supp. 2d at 370. The district court believed that "UNITE's actions amounted to . . . trolling [that was] far short of the concreteness Congress had in mind to remove the DPPA's protection." *Id.* The NRTW's trolling is almost certain to result in a much richer catch than UNITE's because the waters the NRTW is trolling have been stocked with 12,000 potential plaintiffs. The waters UNITE was trolling had far fewer fish, and there was no certainty of finding any claimants or plaintiffs at all. However, that quantitative distinction does not result in a qualitative difference.

In *Pichler v. UNITE* argued that Congress could not have intended to punish tagging under the DPPA because Congress had enacted legislation to protect labor organizing. Thus, according to UNITE,

Congress could not have intended to prohibit a disclosure that advances labor rights conferred by Congress. We rejected that argument. We now reject the NRTW's attempt to argue that since Congress created a cause of action for the improper disclosure of motor vehicle records, it could not have intended to prohibit disclosure to advance that cause of action. None of the Disputed Search Records could advance the adjudication of pending or future litigation. The NRTW is not seeking to obtain information for use in the Pichler class action; on the contrary, as UNITE notes, the NRTW is seeking information about people who are not even members of the *Pichler* class.

Since the proposed use for which the NRTW seeks the Disputed Search Records is not permissible under the DPPA, Pichler class counsel cannot be deemed a "willing speaker." Accordingly, the court action cannot redress the NRTW's asserted injury. The NRTW therefore lacks standing to challenge the protective order.

III. Conclusion.

For the above reasons, we will affirm the district court's order denying the NRTW's motion to modify the protective order and its order denying the NRTW's motion for reconsideration.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION NO. 04-2841

ELIZABETH PICHLER, *et al.*

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES AFL-CIO), *et al.*

ORDER

AND NOW, this 15th day of April, 2008, upon consideration of intervener National Right to Work Legal Defense Foundation, Inc.'s motion for reconsideration of our February 7, 2008 Order (docket entry #253), defendant's response, and both sides' memoranda related to intervener's motion to modify the protective order, and the Court finding:

(a) We will grant a motion for reconsideration only if "the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [rendered its decision]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice," *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999);

(b) In our February 7, 2008 Order, we held that NRTW did not have standing to seek the documents

in question because it had no path of access to the documents, *i.e.*, there is no legal basis for NRTW to get at these documents other than the fact that the plaintiffs have them;

(c) NRTW contends that we erred because the *Pichler* plaintiffs' willingness to give NRTW the documents but for the protective order gave NRTW standing;

(d) Although we reaffirm the reasoning in our February 7, 2008 Order, even if we were to assume that NRTW had standing here, we would still have denied their motion to modify the protective order;

(e) Protective orders will only be granted or maintained if there is good cause, and to determine good cause we "must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled," *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994) (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 432-33 (1991));

(f) Under *Pansy*, we are obliged to specifically consider at least four different factors, to wit, whether (1) the party seeking protection has articulated a specific, concrete injury that would result if disclosure is compelled, (2) those seeking protection are a public entities and the case involves matters of legitimate public concern, (3) the information is sought for a legitimate or illegitimate purpose, and (4) those seeking protection have relied on the protective order, *id.* at 787-89;

(g) We consider each of these factors in turn;

(h) As to factor (1), UNITE contends that one can reverse engineer its organizing strategies through the searches, and that companies hostile to UNITE's activities could more effectively undermine UNITE's endeavors; these strategies are said to be the equivalent of trade secrets, which protective orders are classically designed to shield from public view; but the status of information as a trade secret is not an absolute protection, and can be overcome if the "information important to public health and safety. . . [or] when the sharing of information among litigants would promote fairness and efficiency," *id.* at 787; neither set of circumstances is present here; the case involves no issues of public health and safety, and NRTW seeks the information not to share it with other litigants in this case but with people who are specifically outside of the class; therefore, this factor weighs in favor of maintaining protection;

(i) As to factor (2), although UNITE is not a public entity and this case does not involve issues of public health and safety, UNITE's widespread violation of the DPPA is undoubtedly a matter of legitimate public concern; but the present protective order in no way prevents the plaintiffs from publicizing the litigation or from discussing it with NRTW or anyone else; the limited scope of the protective order shields certain Westlaw searches conducted by UNITE from public view; although it may make it easier for NRTW to vet additional claims by culling information from these searches, that cannot and is not sufficient to modify the protective order;

(j) This brings us to factor (3): NRTW seeks to use the Westlaw searches, which are both over- and under-inclusive, to find more DPPA claims to bring against UNITE; NRTW wants to glean the names of

individuals who do not work for Cintas from the searches and inform these people that UNITE may have illegally accessed their driver's license records; NRTW also suggested protocols to limit the possibility of further disseminating this information and using it to reverse-engineer UNITE's organizing strategies; NRTW's end goal is clearly legitimate, but alternative routes to NRTW's goal exist, thereby undercutting the weight of this factor;

NRTW seeks to side-step the usual investigative process that ought to precede the filing of any complaint; we do not believe that continued protection of the Westlaw searches prevents NRTW from achieving its goal because this case has been well publicized and UNITE's organizing activities are far from hidden; NRTW should be able to find properly vetted claims with some effort; although it would be easier if NRTW had the searches, that by itself is not sufficient to override UNITE's privacy interests;

As to factor (4), UNITE has relied on the protective order; in fact, the *Pichler* plaintiffs have these documents because of the protective order; no confidentiality agreement exists between the parties, and UNITE applied for a protective order specifically to prevent dissemination of this type of information to individuals and organizations like NRTW; had we not granted UNITE's application, it might have legitimately limited the Westlaw searches that it produced in discovery to those involving Cintas employees; we would be pulling the rug out from under UNITE were we at this late date to modify the protective order after UNITE's reliance on it;

(m) Weighing all the foregoing concerns, the balance tips in favor of UNITE, and, therefore, we will deny NRTW's motion for reconsideration;

It is hereby ORDERED that National Right to Work Legal Defense Foundation Inc.'s motion for reconsideration is DENIED.

BY THE COURT:

/s/ Stewart Dalzell, J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

[Filed 02/07/2008]

CIVIL ACTION
NO. 04-2841

ELIZABETH PICHLER, *et al.*

v.

UNITE (UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES: AFL-CIO), *et al.*

ORDER

AND NOW, this 7th day of February, 2008, upon consideration of intervener National Right to Work Legal Defense Foundation, Inc.'s motion to intervene for the limited purpose of modifying protective order (docket entry #240), its motion to modify the protective order (docket entry #241), plaintiffs' responses, and defendants' responses, intervener's reply, and the Court finding that:

(a) The National Right to Work Legal Defense Foundation, Inc. ("NRTW") seeks to intervene in the case for the purpose of modifying our January 7, 2005 Order which permitted defense counsel to designate "potential evidence as confidential if that potential evidence directly related to defendants' labor union organizing or mobilization strategies," January 7, 2005 Order ¶ (a), and obtaining various documents so designated that the plaintiffs currently possess;

(b) NRTW seeks to intervene and modify the existing confidentiality order so that they can acquire from the plaintiffs "(a) Westlaw records of the motor vehicle searches that UNITE conducted from August 2002 to October 13, 2004, and (b) documents indicating, or from which it may be determined, which of these searches were not related to Cintas Corporation," all for the exclusive purpose of "mail[ing] one letter to each individual whose motor vehicle record was searched by UNITE" and who are not related to Cintas, NRTW Mem. at 4;

(c) In our January 7, 2005 Order, we found good cause to grant UNITE's motion for a confidentiality order because UNITE had a well-articulated and specific interest in preventing disclosure of its organizing strategies to Cintas and other employers hostile to UNITE, January 7, 2005 Order ¶¶ (f)-(g); our confidentiality order also recognized two concerns that would potentially limit the confidentiality order's scope: first, plaintiffs' valid interest in sharing information with Cintas "because only Cintas may have information 'necessary to rebut the Defendants' various accusations and defenses . . . and [second,] the public interest in learning whether defendants' conduct was unlawful," *id.* ¶ (h);

(d) UNITE seeks to prevent the plaintiffs from disclosing the requested information to NRTW because NRTW is philosophically opposed to UNITE's organizing activities, and the information NRTW seeks can be used to reverse engineer organizing strategies and combat UNITE's organizing mission, UNITE Mem. at 12;

(e) Recognizing the potential for misuse of such information, NRTW suggests we (1) limit disclosure and use of the information to NRTW staff attorneys,

the NRTW employees under their control, and the printing company hired to print the letter notices, and (2) order NRTW to return all documents to plaintiffs and destroy the copies in NRTW's possession within 14 days after receipt, NRTW Mem. at 4;

(f) To determine whether to modify the confidentiality order we "use the same balancing test that is used in determining whether to grant such orders in the first instance" except we also consider "reliance by the original parties on the confidentiality order," *Pansy v. Borough of Stroudsborough*, 23 F.3d 772, 790 (3d Cir. 1994); this test asks us to "balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of a trade secret or confidential information outweighs the need for discovery, disclosure through discovery cannot be compelled," *id.* at 787 (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 432-33 (1991)); the two ends of our scale are clear: "harm to the party seeking protection [versus] the importance of disclosure to public," *id*;

(g) *Pansy* balancing is only appropriate and relevant when the public has some right to access the relevant records, *e.g.*, common law right of access to judicial records or a statutory right to documents like the Pennsylvania Right to Know Act, and "when the right exists, there is a strong presumption that the public may view the records," *United States v. Wecht*, 434 F.2d 194, 208 (3d Cir. 2007) (internal quotations omitted);

(h) Here, NRTW's only basis for accessing this information is the common law right of access to judicial records; they do not, and we believe cannot,

point to any other common law, statutory, or Constitutional right that would create a path of access to the documents they desire; we must then determine whether the information NRTW seeks constitutes judicial records;

(i) "Simply because a court has entered a confidentiality order over documents does not automatically convert those documents into 'judicial records' accessible under the right of access doctrine," *Pansy*, 23 F.3d at 782; the common law right generally covers any document filed with the court as part of most pleadings or motions, but there is "no such right as to discovery motions and their supporting documents," *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 165 (3d Cir. 1993); our Court of Appeals reached this conclusion in *Leucadia* because it feared that to extend the common law right of access further would potentially "make raw discovery, *ordinarily inaccessible to the public*, accessible" because it was included in discovery motions, *id.* at 164 (emphasis added); discovery in general is "conducted in private as a matter of modern practice . . . [and] restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information," *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984); thus, the public does not have a presumptive right to "raw discovery" produced by the litigants;

(j) "Liberal discovery is provided for the sole *purpose* of assisting in the preparation and trial, or settlement, of litigated disputes," *id.* at 34 (emphasis added); the district court inserts itself in the discovery process to facilitate and expedite dispute resolution; were we to permit wholesale access to the fruits of raw discovery it would increase the time and therefore

the cost of litigating discovery disputes; every single item of information produced could potentially find its way into the public sphere and in every case there would always be some party that would rather that not happen and therefore would be inclined to litigate each contentious document; by limiting the public's access to documents actually filed in pleadings or substantive motions with the district court, we avoid making discovery unnecessarily laborious and focus our and the litigants' attention on specific documents that are in the judicial record and hence the public sphere;

(k) Here, NRTW's only right of access is through the common law right of access to judicial records, but what NRTW seeks has not been filed with the court in any motions or pleadings; instead, it consists of defendants' production to the plaintiffs, NRTW Mem. at 3; such documents are raw discovery and are ordinarily inaccessible to the public through the common law right of access; thus, NRTW has no path of access to this information or a presumptive right to it;

(l) With no path of access, we are cannot accord NRTW's position any weight; in fact, we cannot conduct a *Pansy* balancing at all because the test is designed to determine when documents that are presumptively public should be accorded confidentiality protections, *see Pansy*, 23 F.3d 772, 780-81; here the documents are not presumptively public, but (indeed) are classically private, *see Seattle Times Co.*, 467 U.S. at 33;

(m) The public, and NRTW as its champion here, does not at this time have a right to access these documents, and therefore we cannot modify the confidentiality order granted to UNITE for good cause;

this does not mean that the documents in question will not eventually become judicial records and thus susceptible to *Pansy* balancing, or that NRTW could not access such documents through other means, but NRTW cannot access these documents through the pending motion at this time;

It is hereby ORDERED that:

1. Intervener National Right to Work Foundation, Inc.'s motion to intervene for the limited purpose of modifying the confidentiality order is GRANTED; and

2. Intervener's motion to modify the protective order is DENIED.

BY THE COURT:

/s/ Stewart Dalzell, J.
Stewart Dalzell, J.

APPENDIX D

Driver's Privacy Protection Act of 1994
("DPPA"), 18 U.S.C. §§ 2721-25

18 U.S.C. § 2721. PROHIBITION ON RELEASE AND USE OF CERTAIN PERSONAL INFORMATION FROM STATE MOTOR VEHICLE RECORDS

(a) In general.—A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): Provided, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

(b) Permissible uses.—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-

owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) Resale or redisclosure.—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b)(11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver procedures.—A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b),

may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(e) Prohibition on conditions.—No State may conditon or burden in any way the issuance of an individual's motor vehicle record as defined in 18 U.S.C. 2725(1) to obtain express consent. Nothing in this paragraph shall be construed to prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

18 U.S.C. § 2722. ADDITIONAL UNLAWFUL ACTS

(a) Procurement for unlawful purpose.—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) False representation.—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

18 U.S.C. § 2723. PENALTIES

(a) Criminal fine.—A person who knowingly violates this chapter shall be fined under this title.

(b) Violations by State department of motor vehicles.- Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

18 U.S.C. § 2724. CIVIL ACTIONS

(a) Cause of action.—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies.—The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2725. DEFINITIONS

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof;

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on

vehicular accidents, driving violations, and driver's status.]

(4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information; and

(5) "express consent" means consent in writing, including consent conveyed electronically that bears an electronic signature as defined in section 106(5) of Public Law 106-229.